IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

MONDAY, THE 13TH AUGUST 2007 / 22ND SRAVANA 1929

Bail Appl..No. 4823 of 2007()

CRIME NO.217/07 OF KODUVALLY POLICE STATION

PETITIONERS/ACCUSED 2,3 & 4

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1. HAMZA, S/O. AHAMMED KUTTY,
   AGED 24 YEARS, ALOLA PARAMBIL, KARUVAMPOYIL,
   KODUVALLY.

2. SHAHAD, S/O. MUHAMMED HAJEE,
   AGED 17 YEARS, MANAPATTIL, KARUVAMPOYIL,
   KODUVALLY.

3. SHAMEER, S/O. ABDULRAHIM, AGED 22 YEARS,
   VAZHAPPURATH, KARUVAMPOYIL, KODUVALLY.

BY ADV. SRI.K.A.SALIL NARAYANAN

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.JAI GEORGE.

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 13/08/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

B.A. No. 4823 OF 2007

Dated this the 13th day of August, 2007

ORDER

Application for anticipatory bail. The petitioners were initially arrayed as accused 2, 3 and 4. Altogether five accused were shown in the array of parties in the F.I.R. In the course of investigation, accused 1 and 5 have been removed from the array of accused. The learned counsel for the petitioners submits that the allegations are totally false and vexatious. The police have found that the allegations in so far as they relate to accused 1 and 5 are false. All other offences are bailable offences. Allegation under Sec.308 of the IPC has been included unnecessarily to ensure vexation. An insignificant fracture had been detected and the section has now been altered from Sec.324 to Sec.326 of the IPC. At any rate, there is absolutely no justifiable reason to incorporate the allegation under Sec.308 of the IPC. Because of the inclusion

of the offence under Sec.308 of the IPC, the petitioners are not likely to be granted bail by the learned Magistrate - that offence being triable exclusively by a Court of Session.

2. The learned Public Prosecutor opposes the application on the ground that the offences alleged include the offence triable under Sec.326 of the IPC and that there are no circumstances justifying the invocation of the equitable discretion under Sec.438 of the Cr.P.C. I am in agreement with the learned Public Prosecutor on that aspect. But I find merit prima facie in the submission of the learned counsel for the petitioners that the allegation under Sec.308 of the IPC has been included without justifiable reason. In fact, a perusal of the F.I.R., as contended by the learned counsel for the petitioners, would reveal that the allegation under Sec.308 of the IPC was included on the basis of the assertion that the 1st accused had attempted to tighten the towel around the neck of the de facto complainant and strangulate him. That allegation has been found to be unacceptable. I am, in these circumstances, of opinion that there can be appropriate direction issued under Sec.438 of the Cr.P.C.

3. In the result, this application is allowed in part. It is observed that the petitioners can surrender before the Investigating Officer or the learned Magistrate having

jurisdiction. The petitioners can apply for bail after giving sufficient prior notice to the Prosecutor. While considering the application for bail, the learned Magistrate shall eschew the allegation under Sec.308 of the IPC and pass appropriate orders on merits and expeditiously – on the date of surrender itself.

(R. BASANT, JUDGE)

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